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No. 84-1383

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

BRYN MAR, LTD., a Limited Partnership, by its General Partner, ANGEL MANAGEMENT CORPORATION, a California Corporation; ROBERT BIENER, ESTELLE BIENER, BARTON J. BLINDER, ROBERTA BLINDER, JAIME BOROVINSKY, CHARNE DORA BOROVINSKY, ARMANDO HERNANDEZ and MIRTA HERNANDEZ,

Petitioners,

vs.

CARLTON BROWNE AND COMPANY, INC., a California Corporation, and RICHARD C. BROWNE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Carlton Browne and Company, Inc.* and Richard C. Browne respectfully request that the Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered September 24, 1984.

*Carlton Browne and Company, Inc. has no parent company, no subsidiaries, and no affiliates.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issues concerning fundamental policies of national jurisprudence, nor does it involve a new or novel issue of law. While arising out of a summary judgment on a RICO claim, it does not even remotely implicate the interpretation or application of those federal statutes. Instead, it is merely another of the countless cases challenged each year on the adequacy of the evidentiary record to support the trial court decision. There are no circumstances warranting Supreme Court review and the petition for writ of certiorari should be denied.

Petitioners contend that in affirming the district court's summary judgment the Ninth Circuit raised and decided "*sua sponte*" the issue of the competency of petitioners' evidence. That is not correct. Petitioners themselves placed the competency of their evidence in issue by contending on appeal that the district court erred in finding no genuine issue of material fact and granting summary judgment. Moreover, the appeal challenged the district court's express finding that petitioners had failed to "meet their burden as a party opposing a detailed motion for summary judgment to 'come forward with facts, and not allegations, to controvert the moving party's case.' " (Citations omitted.) ("Memorandum Decision" of United States District Court, p. 11, lines 3-8, Exhibit B of Petitioners' Brief). In short, the district court found that petitioners' "evidence" was deficient both as to its adequacy and its competency.

In reviewing the lower court's decision, therefore, a major question before the Ninth Circuit was whether petitioners' evidence in the district court was sufficient to raise a genuine issue of material fact. That question was properly resolved against petitioners. The Ninth Circuit

affirmed "the summary judgment solely on the basis of Bryn Mar's failure to raise a triable issue of fact with respect to the existence of indictable mail fraud." ("Memorandum" of United States Court of Appeals for the Ninth Circuit, p. 3, lines 17-19, Exhibit A of Petitioners' Brief).

Petitioners also complain that instead of affirming the summary judgment granted by the lower court, the Ninth Circuit should have remanded the case for further evidentiary proceedings to enable them to supplement the record. This position is patently untenable in view of the analysis of the district court and the status of the case. Respondents brought their motion for summary judgment only a few weeks before the scheduled trial of the case. Yet petitioners, even at that late date, were unable to offer evidence disclosing a genuine issue of material fact to be tried. As stated in *Glesenkamp v. Nationwide Mutual Insurance Company*, 71 F.R.D. 1, 4, aff'd, 540 F.2d 458 (9th Cir. 1976):

> "The time must arrive in every case when the plaintiff must demonstrate that there is a genuine issue for trial or have summary judgment entered against him."

Both the district court and the Ninth Circuit in the instant case found that the time had come for petitioners to present their evidence or to have summary judgment rendered against them.

Petitioners seek to invoke the jurisdiction of this Court not to resolve a novel or important question of law nor to remedy some aberrant procedure, but merely to obtain an unjustified third review of the decision on respondents' motion for summary judgment. This case was decided on usual and ordinary grounds and is no different from any other case where the losing party argues that the decision is not supported by the evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
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